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IN THE

Supreme Court of the United States

October Term 1963.

No. 252

et

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Petitioner,

against

A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. TV CORP., W. P. I. X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Respondents.

Petition for a Writ of Certiorari by Dave Fleischer, Individually and as Trustee and Receiver in Dissolution of Fleischer Studios, Inc., to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1964

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963.

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of Fleischer Studios, Incorporated, a Florida corporation,

Petitioner,

against

A. A. P., Inc., ASSOCIATED ARTISTS PRODUCTIONS, Inc., U. M. & M. TV CORP., W. P. I. X., Inc., PARAMOUNT PICTURES, Inc., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, Inc, KING FEATURES SYNDICATE, Inc., FLEISCHER STUDIOS, Incorporated, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of Fleischer Studios, Incorporated, a Florida corporation,

Respondents.

Petition for a Writ of Certiorari by Dave Fleischer, Individually and as Trustee and Receiver in Dissolution of Fleischer Studios, Inc., to the United States Court of Appeals, Second Circuit.

Dave Fleischer, a resident of the State of California, respectfully petitions the Justices of the Supreme Court of the United States for a writ of certiorari to the United States Court of the Appeals for the Second Circuit to review the judgment of said Court decided March 23, 1964, which unanimously (1) affirmed an order of the United States District Court for the Southern District of New York, Palmieri, J., dated July 27, 1959, which dismissed the petitioner's antitrust cause of action against the de-

[illegible] Paramount Pictures Corporation and Paramount Pictures, Inc., on the merits and denied the motion of the petitioner for leave to serve a supplemental complaint so as to set forth his appointment as receiver of a dissolved Florida corporation, Fleischer Studios, Incorporated, (2) affirmed a judgment of said United States District Court, Ryan, Ch. J., granting the motion of all of the defendants (respondents herein) summarily dismissing the petitioner's action for an accounting and other relief and granting summary judgment to all defendants on September 14, 1959 (161a). The order of Paterson, J., was omitted (fn.) and hence not previously appealable.

(a) Opinions below.

The opinion of Paterson, J., dated July 15, 1959, is reported in 180 Fed. Supp. 738, and the pertinent portions thereof which are applicable on this petition are printed at pages 60a to 65a of the petitioner's appendix to the U. S. Court of Appeals.

The opinion of Chief Judge Ryan granting summary judgment dismissing the second amended complaint containing an accounting action is reported in 222 Fed. Supp. 41, and is printed at pages 145a to 161a of the petitioner's appendix to the U. S. Court of Appeals. Said opinion of Chief Judge Ryan was primarily based upon the decision of collateral estoppel by reason of a judgment in the cases of *Dave Fleischer v. W. P. I. X., Inc.*, and *Dave Fleischer v. F. F. A. Pictures, Inc.*, decided by Judge Harold Hart in the Supreme Court, New York County (1961), which dismissed plaintiff's complaint after trial. The opinion of Judge Hart is reported in 30 Misc. 2d 17.

The opinion of Kaufman, Circuit Judge, rendered March 21, 1961 is reported in F. 2d and appears at

page 263a of the record at the United States Court of Appeals. It is printed in the appendix to the within petition as appendix A at page 49, *infra*.

(b) Jurisdictional statement of grounds upon which a petition for a writ of certiorari is sought.

(i) The date of the judgment of the United States Court of Appeals, Second Circuit, sought to be reviewed is March 23, 1964, which is the date of its filing (see judgment 268a-269a).

(ii) The petitioner filed a timely petition for rehearing and rehearing *en banc* on April 2, 1964 (270a), which was denied on April 14, 1964 (278a), and no active Circuit Judge having requested that the case be reheard *en banc*, the said petition was denied on April 14, 1964 (283a). A petition for rehearing is timely made in the Second Circuit if made within 15 days of the date of the filing of the original opinion in said court (Rule 25[a], C. C. A. 2d). The motion for rehearing was made within 10 days of said judgment and was, therefore, timely. The 90th day for the filing of the within petition will fall on July 13, 1964.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, U. S. Code, Section 1254(11).

(c) The questions presented for review.

Q1. Is the petitioner Dave Fleischer, *individually*, entitled to maintain the action for antitrust violations against the respondents Paramount Pictures, Inc., and its successor Paramount Pictures Corporation (hereafter Paramount respondents) where it clearly appears (a) that

the commerce of said individual petitioner was interfered with and destroyed by the Paramount respondents under two contracts dated May 27, 1938, and May 24, 1941, between Paramount respondents as distributor of motion picture cartoons produced by Fleischer Studios, Incorporated, of which petitioner was a 50 per cent stockholder, (b) petitioner *individually* was compelled to consent as such stockholder to the surrender to Paramount respondents of all of the real property and personal property consisting of a film library worth $10,000,000 belonging to Fleischer Studios because of a fictitious default brought about by Paramount's antitrust activities by means of which said film library was kept from the television market by Paramount respondents from 1941 until 1956 and when released resulted in hundreds of millions of dollars profit from their exploitation, (c) petitioner was individually placed in bondage to Paramount respondents and his commerce destroyed and interfered with by contractual provisions enforced upon him individually which deprived him of the use of his own name in the production of motion picture cartoons in perpetuity, (d) in being required to become exclusively employed in the production of motion pictures for distribution by Paramount respondents with five annual successive employment options granted to Paramount respondents, (e) with negative covenants restraining petitioner individually from competition with Paramount, (f) with options to purchase everything produced by petitioner individually granted to Paramount, (g) in being striped of the patents invented by petitioner needed to run his business, and (h) in being required to deliver his resignation in blank as director and officer of Fleischer Studios to Paramount, (i) all of which antitrust activities resulted in the involuntary dissolution of Fleischer Studios, Incorporated, in 1946 by proclamation of the Governor of Florida for non-payment of taxes.

Q2. Where, as here, the antitrust suit is for damages resulting from a single continuous wrong and from the cumulative effect of a contemplated series of acts to accomplish a common purpose and object, was it not error to hold that the cause of action accrued when the contract of May 24, 1941, was entered into, instead of holding that the cause of action did not accrue, and the applicable limitations did not begin to run until the common purpose and object of the conspiracy had been achieved by the sale in 1956 for television exploitation of the motion picture cartoons produced by plaintiff and Fleischer Studios, Incorporated?

Q3. Did the U. S. Court of Appeals, Second Circuit, in holding that plaintiff was barred under Florida law from maintaining the antitrust action in his capacity as "trustee in dissolution" or "receiver" of Fleischer Studios, Incorporated, because "all corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved" decide an important state matter in conflict with the applicable Florida law?

Q4. Was the order of Judge George E. Holt of the Circuit Court of Dade County, Florida, dated December 19, 1957, appointing Dave Fleischer the receiver of Fleischer Studios, Incorporated, a dissolved Florida corporation, pursuant to Chapter 608, Florida Statutes (1957), entitled to full faith and credit under Article IV, Section 1, of the United States Constitution?

Q5. As interpreted by the U. S. Court of Appeals, Second Circuit, does not the alleged "abatement" Florida statute deprive the plaintiff of his property without due process of law in violation of Section 1 of the Fourteenth Amendment?

Q6. Where, as was shown by petitioner in opposition to the motion for summary judgment dismissing the ac-

counting action based upon the invocation of the doctrine of collateral estoppel defensively by defendants, that the judgments of the Supreme Court, New York County, were upon causes of action completely different from the cause of action for an accounting pending in the U. S. District Court, and the State Court refused to and did not pass upon the issues and that many important issues remained to be tried, was it not a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to have granted summary judgment dismissing the accounting cause of action without a trial?

(d) The constitutional provisions and statutes which the case involves.

(1) Dissolution of Florida corporations.

Fleischer Studios, Incorporated, was organized on July 21, 1938, and involuntarily dissolved by proclamation of the Governor of Florida on May 16, 1946, for failure to pay its corporate franchise taxes for a period of three years as provided in Section 4 of Chapter 16880, Acts of 1935, Laws of Florida. The law in its entirety is set forth in appendix B at page 52, *infra*.

This was the first law enacted by the State of Florida to compel delinquent corporations to pay their franchise taxes or to be *involuntarily dissolved*. It provides in Sections 9 and 10 thereof as follows:

> "Section 9: The directors of any corporation dissolved under the provisions of this Act shall be trustees for any property that may be owned by such corporation and shall handle and dispose of the same for the benefit of the stockholders *but the corporation as such, after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation.*" (Italics supplied.)

"Section 10: All laws and parts of laws in conflict with this Act be and the same are hereby repealed."

The law as to voluntary dissolution of Florida corporations had been previously enacted by Chapter 10096, Laws of 1925, and to the extent, if any, that was in conflict with the provisions for involuntary dissolution enacted ten years later as above shown, it was repealed. It provided in pertinent part by Section 44 for voluntary dissolution and by Section 45 for the continuation of the corporation, after dissolution for purposes of suit for the term of three years:

> "Section 45. *Continuation of Corporation After Dissolution, for Purposes of Suit, Etc.* All corporations whether they expire by their own limitations, or are otherwise dissolved, *shall nevertheless be continued for the term of three years* from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their assets, but not for the purpose of continuing the business for which said corporation shall have been established." (Italics supplied.)

That portion of the laws of 1925 dealing with voluntary dissolution of corporations is set forth in appendix C at page 55, *infra.*

The next legislation in point of time which is relevant to the inquiry here presented is Chapter 20895 of the Laws of Florida of 1941, effective June 12, 1941, or three years after the organization of Fleischer Studios, Incorporated, in 1938. Said law is captioned as "Providing Additional Duties and Powers for Trustees of Dissolved Corporations" fixing the length of time in which trustees of dissolved corporations may act as such trustees; prescribing the manner in which such duties and powers shall

be exercised, providing for the filling of vacancies in the trustees, etc. It specifically referred to corporations involuntarily dissolved under Section 9 of Chapter 16,880, Laws of 1935. Chapter 20895 of the Laws of 1941 (Florida) provided as follows in pertinent part:

> "SECTION 1. Trustees of any dissolved corporation and trustees of the property of any *dissolved corporation provided for under Section 9 of Chapter 16,880, Laws of Florida Acts of 1935, shall in addition to the power and authority respectively provided in said sections, be and continue as trustees of the property of such dissolved corporation for the benefit of the stockholders*, so long as such dissolved corporation holds of record in this state any right, title, interest, claim, lien or demand in, to or upon real property, *but in no event shall the term of such trustee exceed twenty years from the date of such dissolution.*" (Italics supplied.)

The foregoing was the first legislation which fixed the term of office of the trustees of dissolved corporations for a term of twenty years from the date of dissolution. Since the Fleischer Studios, Incorporated, was dissolved by proclamation of the governor of Florida on May 16, 1946, its two directors on the date of dissolution, Dave Fleischer and Max Fleischer, became its trustees in dissolution for a period of twenty years from said date or until May 16, 1966. As such trustees they had the right to handle and dispose of the corporate property as such trustees for twenty years. *But the corporation, as such, after being dissolved did not have any corporate rights nor was it authorized to transact any business as a corporation* (Section 9, Laws of Florida, 16,680-1935) from the date of its dissolution by proclamation of the Governor, on May 16, 1946.

In 1951 the General Provisions of the Corporation Laws of Florida were enacted as in Chapters 610, 611 and 612 contained.

Turning now to Sections 610.16, 610.17 and 610.18, Laws 1951, we find transferred to the Laws of 1951 these sections of the Florida law dealing with involuntary dissolution by proclamation of the governor of Florida which were transferred from the Laws of 1935, Chapter 16,880, quoted above. In a word the scheme of the Florida legislators was to put into Chapter 610 of the Laws of 1951 all previous laws dealing with involuntary dissolution. Again we find in 610.18 the effect of involuntary dissolution:

> "* * * The directors of any corporation dissolved as aforesaid shall be trustees for any property that may be owned by such corporation and shall handle and dispose of same for the benefit of the stockholders *but the corporation, as such, after being dissolved shall have no corporate rights or be authorized to transact any business as a corporation* * * *." (Italics supplied.)

In 1957 the confusion created by these separate provisions for involuntary and voluntary dissolution of Florida corporations was resolved by the repeal of Chapters 610 and 612 of the Laws of 1951 and the inclusion of a single such provision for both involuntary and voluntary dissolutions in a single Chapter 608 captioned Corporations and Business Trusts. This law was in 608.01 declared to be applicable and to extend to all corporations, but there was a saving clause as to past corporations as follows:

> "The validity of no corporation heretofore created nor the validity of any provision of any existing charter or certificate of incorporation or by-laws or any corporate action heretofore taken thereunder shall be in any way affected hereby; nor shall the effectiveness or validity of any property, grant, right, franchise or privilege heretofore acquired by any such corporation, or of its right thereto or possession thereof, be in any way affected hereby."

Under the 1957 laws voluntary dissolution is provided for in 608.27 while involuntary dissolution is provided for in 608.36.

Appointment of Receivers Under Florida Law.

There is a single provision for the appointment of receivers by the Circuit Court contained in 608.29 (1957) under which provision the plaintiff Dave Fleischer was appointed receiver herein, which law gives him the power "to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute in the name of the corporation or otherwise, all such suits as may be necessary or proper for the purpose aforesaid, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of such trustees or receivers may be continued as long as the Circuit Court shall find necessary for the purposes aforesaid" (see appendix D, page 60, *infra*, for entire provision).

Although plaintiff was appointed receiver by the Circuit Court of Dade County, the jurisdiction of said court was questioned collaterally by the U. S. Court of Appeals which held that the rights, remedies and property of Fleischer Studios, Incorporated, died three years after its dissolution on May 16, 1946, or on May 16, 1949; that with the expiration of the three-year period, Fleischer Studios, Incorporated, became defunct for all purposes and neither the corporation nor its trustees, nor any receiver appointed subsequent to the expiration of the three-year period has any status to maintain a suit because all claims abated three years after the corporation is dissolved.

(2) Florida Statute of Limitations on sealed instruments is twenty years.

Section 95.11 of the Florida Statute of Limitations provides in pertinent part:

> "95.11 *Limitations upon actions other than real actions.*
>
> "Actions other than those for recovery of real property can only be commenced as follows:
>
> "(1) Within twenty years. * * * an action upon a contract, obligation, or liability founded upon an instrument of writing under seal."

The contract of May 24, 1941, was under seal. It was executed in Florida and to be performed in Florida. Therefore, barring the application of the extreme doctrine of "abatement," the 20-year Florida Statute of Limitations would have been applicable, upon the liability founded upon the "instrument of writing under seal" which cause of action would not have been barred until May 24, 1961. The antitrust amended complaint was served on November 14, 1957.

(3) The illegality of contracts violative of the antitrust laws.

Sections 1 and 3 of Title 15, U. S. Code, provide:

> "Section 1. Every contract, combination, in form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states, or with foreign nations, is declared to be illegal.
>
> "Section 3. Every contract combination in form of trust or otherwise or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, * * * is declared illegal."

(4) The suspension of limitations pending Government suit.

The antitrust action of *United States v. Paramount Pictures, Inc., et al.*, was commenced on July 30, 1938, in the U. S. District Court for the Southern District of New York and was pending until April 12, 1949 (see *Leonia v. Loews,* 117 F. Supp. 747, 762). Section 16 of Title 15 of the U. S. Code provided in the years 1938 to and inclusive 1950.

> "Whenever any suit or proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws based in whole or in part on any matter complained of in said suit shall be suspended during the pendency thereof."

(5) The enactment of the Uniform Federal Antitrust Statute of Limitations.

The uniform Federal Statute of Limitations in antitrust actions was enacted in 1955, 69 Stat. 283, enacting 15 U. S. C. Section 16(b), which became effective January 7, 1956. Under this statute, plaintiff had until January 7, 1960, to commence his antitrust action.

The antitrust action was commenced on November 14, 1957.

(e) A concise statement of the case containing the facts material to the consideration of the questions involved, in the antitrust cause of action which was dismissed on July 27, 1959, on the face of the pleadings, by Palmieri, D. J.

Fleischer Studios, Inc., was organized under the laws of New York in the year 1929, to make motion picture cartoons. Petitioner Dave Fleischer and his brother Max Fleischer, were its sole stockholders, each owning 50% of its stock and its only directors. In the years from 1929 to 1938, there were produced by Fleischer Studios, Inc. (N. Y.) ("Original Fleischer Corporation"), a huge cartoon film library which had cost $10,000,000, and which was owned by said corporation, free and clear. Dave Fleischer was the "Director" of said motion picture cartoons and Max Fleischer was the "Producer." This library included some of the film cartoon classics which have brought joy to millions of people throughout the world at the time of their creation in 1929 to 1941, and since their revival on television in the year 1956. These perennials include the Popeye cartoons, Betty Boop, Koko The Clown, etc. The film cartoons were distributed by respondent, Paramount Pictures, Inc. Respondent King Features Syndicate, Inc., was the owner of the comic strip Popeye, which appeared in syndicated columns of newspapers. In 1932, King Features, licensed Fleischer Studios, Inc. (N. Y.), to use the Popeye characters in the making of motion picture cartoons. Petitioner Dave Fleischer invented the character Bluto, as a foil to the diminutive Popeye. Petitioner Dave Fleischer and his brother Max, were the owners individually of many patents used in the making of said motion picture cartoons.

On or about the 27th day of May, 1938, the respondent, Paramount Pictures, Inc., entered into a conspiracy,

violative of the antitrust laws of the United States, with its employees, attorneys, servants, agents, distributors, exhibitors, affiliated subsidiary and associated corporations, the purpose and intent of which was to seize, destroy, capture and take unto itself the business and property of petitioner Dave Fleischer, defendant Max Fleischer, their patents and copyrights, the business of Fleischer Studios, Inc., N. Y., and of a corporation ultimately to be formed under the laws of the State of Florida, called Fleischer Studios, Incorporated, which assumed and became the owner of all of the property and assets of Fleischer Studios, Inc. (N. Y.) (31a).

By the aforesaid agreement of May 27, 1938, with Paramount Pictures, Inc., the "Original Fleischer Corporation" undertook to write, and create a motion picture cartoon called "Gulliver's Travels," and for the continued production of various other motion picture cartoons and to move its plant from New York to Miami. A loan of $100,000 was made by Paramount to "Original Fleischer Corporation" to finance such removal which as part of the conspiracy required *the hypothecation of the personal property of Dave Fleischer individually and that of Max Fleischer as well as that of the "Original Fleischer Corporation,"* with the impression falsely conveyed and representations falsely made by defendant Paramount Pictures, Inc., and its agents, that the returns from the distribution of said motion picture cartoons would be used to repay the said loans, to be amortized over a period of ten years (Comp. par. 28, p. 32a).

The provisions of Article Twelfth (g) and (h) of said agreement dated May 27, 1938, were in fact and were declared by the decree of the United States District Court for the Southern District of New York, entered April 21, 1949, in the suit in equity of the *United States of America v. Paramount Pictures, Inc.*, to violate the Clayton Act

and embody acts in restraint of trade (Comp. par. 29, p. 32a). The above provisions apply as well to renewals or exercise of options to produce other motion picture cartoons which Paramount Pictures, Inc., called for production (Am. Comp. par. 28, pp. 30a, 31a, par. 29a, p. 31a). On April 18, 1939, the agreement of May 27, 1938, was modified and assumed by Fleischer Studios, Incorporated, the Florida corporation, and the identical provisions which are violative of the Clayton Act were embodied in the modified agreement, and the production of additional motion picture cartoons were called for by the said modified agreement (Comp. par. 30, p. 36a).

The agreement of *May 27, 1938*, as amended and supplemented violated the antitrust laws of the United States by among other things, resorting to block booking of films, master agreements as to franchises, acquisition and use of theatres owned by affiliated companies or theatres owned by distributors either alone or jointly with defendant being used for distribution of films, discrimination against and favoring of exhibitors, suppression of films before their full release possibility had been achieved, booking of films of Fleischer Studios of Florida with its own films of inferior type and quality and the charging of a slight amount for the films of Fleischer Studios of Florida while taking the maximum amount for its own films and the rendition of false accounts to Fleischer Studios, Florida, made so because of the monopolistic and antitrust activities of Paramount Pictures, Inc. (Comp. par. 31, p. 36a).

Pursuant to the foregoing scheme, plan and conspiracy defendant Paramount Pictures, Inc., exercised an option under the agreement of May 27, 1938, to call upon Fleischer Studios, Florida, to produce an additional feature motion picture cartoon ultimately titled "Mr. Bug Goes To Town" and required the expenditure and commitment of

$[illegible] by said Fleischer Studios, Florida, on said feature film and other motion picture cartoons (Superman and Popeye) (Comp. par. 32, p. 37a).

Pursuant to the foregoing scheme, plan and conspiracy said defendant, Paramount Pictures, Inc., its agents, servants, employees and attorneys did on or about May 24, 1941, seize and take into its physical possession the plant and equipment of Fleischer Studios, Florida, and the personal property consisting of the film library covered by chattel mortgage including but not limited to the property which it had received by assignment from "Original Fleischer Corporation" and as its successor, set forth in paragraph 3 of the amended complaint; in furtherance thereof Paramount Pictures, Inc., stopped or threatened to stop the payroll of approximately $35,000 per week then outstanding because of commitments made by Fleischer Studios, Florida, *and threatened insolvency or bankruptcy proceedings against Fleischer Studios, Florida, unless said Dave Fleischer and Max Fleischer as sole stockholders of Fleischer Studios, Florida, consented to the sale and transfer and assignment of all the foregoing assets and all real and personal property, copyrights, films, trade-marks, patents owned by them individually and owned by Fleischer Studios, Florida, to Paramount Pictures, Inc., and executed the agreement dated as of May 24, 1941, waiving an accounting as to all past exhibitions of film cartoons by Paramount Pictures, Inc. That, under duress of property plaintiff, Dave Fleischer, defendant, Max Fleischer, and Fleischer Studios, Florida, and by reason of the force and coercion exercised upon them and the deception practiced upon them by defendant, Paramount Pictures, Inc., its agents, servants and employees, plaintiff (Dave Fleischer) and Max Fleischer made and executed the agreement dated as of May 24, 1941, annexed to the original complaint herein, individually*

and as officers of Fleischer Studios, Florida, and under like duress, coercion and force executed a bill of sale by separate instrument dated as of May 24, 1941, by Fleischer Studios, Florida, to Paramount Pictures, Inc., of all personal and real property belonging to it, a certificate of the stockholders and officers of Fleischer Studios, Florida, attesting same (Comp. par. 32, pp. 37a, 38a).

That it was part of the scheme, plan and conspiracy of the defendant, Paramount Pictures, Inc., its officers, agents and employees to continue such antitrust activities after May 24, 1941, by preventing the said Dave Fleischer and Max Fleischer individually from using the name Fleischer Studios, or the Dave Fleischer Studios, after the termination of their relationship with Fleischer Studios, Florida, but to compel them to become employed by said corporation to complete the film cartoons then in process of completion, under existing options, i. e., "Mr. Bug Goes to Town," 12, "Popeye" cartoons, 10, "Superman" cartoons and a two-reel feature cartoon called "The Raven" (Comp. par. 33, p. 38a).

Pursuant to said scheme, plan and conspiracy, the said Paramount Pictures, Inc., continued the objectionable parts of the agreement of May 27, 1938, in the agreement dated as of May 24, 1941 (i. e., block booking, etc.), in violation of the Clayton Act and *pursuant to said conspiracy the said defendant, Paramount, exacted from plaintiff, Dave Fleischer, and Max Fleischer an assignment of their shares of stock in Fleischer Studios, Florida, as collateral security for their individual performance of the agreement dated as of May 24, 1941, their resignations in blank, to be exercised at the will of said defendant, Paramount, and a negative convenant restraining said Dave Fleischer from competing with defendant, Paramount in the release of the tremendous film library obtained under duress, coercion and force practiced upon*

plaintiff (Dave Fleischer) and Max Fleischer. It was part of the aforesaid scheme, plan and conspiracy after obtaining said film library to hold the same for ultimate release by television when the said industry had sufficiently progressed to make said release commercially feasible. Prior to the forced and coercive assignment of the film library to defendant, Paramount Pictures, Inc., it had no interest in the television rights thereto; the film library had been assembled at a cost of ten million dollars to "Original Fleischer Studios" and it was the owner thereof free and clear of any debts or liens thereon; that Paramount's sole rights of release for television of films were in the motion picture cartoon "Gulliver's Travels" and a relatively small quantity of "Popeye" and "Superman" cartoons released in the year 1939 (Comp. par. 33, p. 38a).

Continuing said conspiracy, defendant, Paramount Pictures Corporation (successor to Paramount Pictures, Inc.), has withheld the said film library from distribution from 1949 until the year 1956, and has failed to cause to be distributed for television purposes either the film library or the "New Cartoons" made pursuant to the agreement dated as of May 24, 1941, to wit, "Mr. Bug Goes to Town" and other cartoons obtained by like transfer, from 1949 to 1956, during which time there was an active market for said film library and the "New Cartoons" for television purposes (Comp. par. 33, p. 38a).

(f) Contrary to the holding of United States Court of Appeals the second (antitrust) cause of action contains allegations tending to show direct injury to the commerce of the plaintiff Dave Fleischer as an individual.

In the instant case, it is a fact that Dave Fleischer was compelled as a stockholder of Fleischer Studios, Incorporated, to consent to the transfer of all of the property, real and personal, to the defendant, Paramount Pic-

tures, Inc., by the agreement of May 24, 1941. By that very agreement his individual competition was suppressed and his commerce was directly injured both as an individual and as stockholder of Fleischer Studios, Incorporated, as is shown by the contract itself.

Thus in Article FIRST of the agreement of May 24, 1941, it was provided (page 2 thereof) of (Exhibit A supplied to the Court).

> "Simultaneously with the execution and delivery of this agreement the parties hereto (Paramount Pictures, Inc., and Fleischer Studios, Incorporated) and *Max Fleischer and Dave Fleischer* will exchange general releases and discharges among themselves reserving solely their rights and obligations under this agreement and under the accompanying agreement executed and delivered by Paramount, Max Fleischer and Dave Fleischer simultaneously herewith."

In Article SECOND of the agreement of May 24, 1941, it was provided that the producer (Fleischer Studios, Incorporated) shall sell and transfer all of its property real and personal, to Paramount by proper and suitable instruments. This transfer required the consent of both Dave Fleischer and Max Fleischer as the owners of 50 per cent each of the outstanding common or voting stock of Fleischer Studios, Incorporated, to make it effective. This individual consent was given by Dave Fleischer.

By Article SECOND (e) of the agreement of May 24, 1941, Paramount stripped Max and Dave Fleischer of their patents and applications for patents "used or intended to be used in or in connection with the production of motion pictures or motion picture cartoons free of charge and without the payment of any royalties or sums whatsoever, but with the privilege of reserving the nonexclusive right (assignable only to a corporation or cor-

porations, not less than one-half of the stock of which shall be owned by either Max Fleischer or Dave Fleischer) to use such patents without the payment of any royalties or sums whatsoever to the Producer or Paramount, and such non-exclusive right may be exercised by either or both Max Fleischer and Dave Fleischer on behalf of either or both of themselves or on behalf of any person, firm or corporation by whom they may be employed but only during the period of such employment" (page 7, agreement, May 24, 1941). Thus Dave Fleischer was suppressed in his own commerce in the use of his own patents in competition with Paramount in the production of motion pictures and motion picture cartoons and he was the party whose commerce was directly injured by such competition (page 7, agreement, May 24, 1941).

The use of the names "Fleischer Studios," "Max Fleischer" and "Dave Fleischer" was exclusively reserved to Paramount at all times in and in connection with the production, distribution, use, exhibition and television by Article FOURTH of the agreement of May 24, 1941, whether during or after the period of the said agreement (p. 10, agreement of May 24, 1941). It is pursuant to the said provision of the agreement that the use of the name of "Dave Fleischer" is made upon television to this day throughout the world, and the commerce of "Dave Fleischer" is directly injured by such use in connection with the sale of merchandise on television.

By Article SIXTH of the agreement of May 24, 1941 (p. 13), Dave Fleischer is required to become employed for a period of 26 weeks thereafter to complete the motion picture cartoons called the "New Cartoons" on behalf of Paramount and he is even forbidden to work on the production of motion pictures as distinguished from motion picture cartoons and everything which he produces

is first to be offered to Paramount (p. 14 of agreement of May 24, 1941). Said provision is as follows:

> "As a provision of permitting Max Fleischer and Dave Fleischer to produce, supervise, direct or be connected with, or in any manner interested in, the production of motion pictures (as distinguished from motion picture cartoons), it is expressly agreed that Max Fleischer and Dave Fleischer will only perform services in connection with such motion pictures outside of the regular business hours during which they are to perform their services for the Producer, and that such services in connection with such motion pictures will not in any manner interfere with the rendition of their services to the Producer; *and, furthermore Paramount shall have the right to purchase and acquire any one or more of such motion pictures at any time after such motion picture or motion pictures shall be produced.* * * *"

By Article NINETEENTH of the agreement of May 24, 1941, it is provided:

> "Paramount shall also have the right, at its election, to use the name and trade-mark of the Producer (Fleischer Studios, Incorporated) and the names Fleischer, Max Fleischer and Dave Fleischer and any one or more of them in or for any screen or other credits and in or for any advertising, exploitation or publicity matters, in or in connection with the new cartoons * * *" (agreement, May 24, 1941, page 44).

By Article TWENTY-THIRD of the agreement of May 24, 1941, Paramount was granted five successive annual options, the fifth of which was to end on May 23, 1947, to call upon the Fleischer Studios, Incorporated, for the production of motion picture cartoons and motion pictures which Paramount may from time to time designate or request (p. 50 of agreement of May 24, 1941).

By the letter agreement of May 24, 1941 (annexed to Exhibit A), signed by Dave Fleischer, he was required to perform the contract undertaken by Fleischer Studios, Incorporated, as collateral security for the performance of the obligations of the corporation and to sign all instruments in connection with the said sale, of all of the assets and property of the corporation, which included his consent as 50 per cent stockholder, to the sale of such property to Paramount and the negative covenant and the consent to the use of his name and that of Fleischer Studios by Paramount.

(g) The basis for federal jurisdiction in the court in the first instance for the antitrust cause of action is Title 15, Section 15 of the U. S. Code, it being an action brought by the plaintiff Dave Fleischer in his individual capacity and as cotrustee with defendant Max Fleischer of Fleischer Studios, Incorporated, a Florida corporation, dissolved by proclamation of the Governor of the State of Florida for nonpayment of franchise taxes on or about May 16, 1946, against the defendants Paramount Pictures, Inc., its successor Paramount Pictures Corporation and defendant Max Fleischer as said cotrustee (Am. complaint, Par. 25, p. 31a).

(h) A concise argument amplifying the reasons relied on for the allowance of the writ as to the antitrust cause of action.

(1) Circuit Judge Kaufman erroneously asserted that "Apart from the merits of Fleischer's claims, several factors justify the dismissals below, which are hereby affirmed. When the conclusory allegations of the complaints are pierced, be they characterized as 'antitrust' or 'accounting' claims, it becomes apparent that plaintiff

is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. And since that agreement was not with Fleischer individually, but with Fleischer Studios, Inc., it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation" (265a). Although petitioner does assert that Paramount has violated the express or implied terms of the agreement of May 24, 1941, he asserts also that said contract was illegal and indivisible. Under Sections 1 and 3 of Title 15 U. S. Code, the contracts enforced upon Dave Fleischer and Max Fleischer as well as upon Fleischer Studios, Inc. (of New York and Florida), were declared to be illegal. The contracts may have been cast in the form of a corporate obligation to produce motion picture cartoons, but actually when the form of these illegal contracts is disregarded, the contracts are for the rendition of personal services by Dave Fleischer as "Director" and Max Fleischer as "Producer" of the motion picture cartoons, with negative covenants enforced upon the petitioner, renewal options for his employment for a period of five years, a consent, as 50% stockholder, to the transfer of the corporate assets to Paramount, a permanent injunction against the use of his own name in business, the lifting of his own patents by Paramount, and the delivery of his resignation in blank to Paramount to be exercised at its own will or caprice.

There are a number of instances where the corporate fiction has been disregarded and the "mere instrumentality" doctrine invoked where the purpose and intent to violate the Clayton Act has been apparent to the Court. Professor Latty has outlined some of these cases in his book *Subsidiaries and Affiliated Corporations* (1936) at page 56 where he says in pertinent part:

> "Sec. 11. *Clayton Act* * * * Thus, under the section of that act, which aims to prevent acquisition

> of the stock of a corporation by another corporation where the effect may be to lessen competition between the two corporations (38 Stat. 731, 15 U. S. C. A. Sec. 18), it was held, without resorting to the language of the act which expressly covered *indirect* acquisition, that the act had been violated where a corporation organized a *subsidiary, which in turn acquired the stock* of three other corporations which were competitors of the parent (*Federal Trade Commission v. Thatcher Mfg. Co.*, 5 F. [2d] 615 [CCA3d, 1925], modified 272US554). * * * The purpose of the act, as is evident from various sections, is to prevent the creation of a monopoly or substantial lessening of competition through certain devices. If those devices are employed through a wholly owned and controlled corporation so that the same end is attained which it is the purpose of the statute to prevent, it is to be expected that the controlled corporation will be designated a 'mere instrumentality.'"

(2) The contracts of May 28, 1938, and May 24, 1941, are clearly violative of the antitrust laws in that they permit block booking of films produced by the Fleischers with other films produced by Paramount and its subsidiaries. The result is that in this accounting setup of defendants Paramount, it was able to allocate the better part of the income received by it to its own product while the hardy perennials of Fleischer were withdrawn from the market from 1941 to 1956, only to be sold at fabulous sums of money for television purposes when they had ceased being competitive with the Paramount product.

The applicable rule was succinctly applied by this Court in the case of *Bruce's Juices, American Can Company*, 330 U. S. 743 at p. 755 and in *Timken Roller Bearing Co. v. United States*, 341 U. S. 593. "That where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgments sought, the Court will entertain

the defense that the contract in suit is illegal under the express provisions of that statute."

In the Restatement of the Law of Contracts, §518, it is said:

> "§518. DIVISIBLE PROMISES IN RESTRAINT OF TRADE:
>
> "Where a promise in reasonable restraint of trade in a bargain had added to it a promise in unreasonable restraint the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; *but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.*"

Williston on Contracts, Volume V, §1659, page 4680, writing on *Divisibility of promises imposing excessive restraint*, says:

> "If, however, a promise is not only wider than is *permissible, but is also indivisible, most courts will not attempt to give partial effect to the promise, but the whole will fall.*"

At page 4682, Williston says:

> "Due to the difference in emphasis in America and England the Restatement of Contracts (17. §518. *Acc. Universal Film Exchanges v. West*, 163 Miss. 272, 141 S. 293; *Lufkin Rule Co. v. Fringelli*, 57 Oh. St. 596, 49 N. E. 1030) states this new rule as invalidating the reasonable clauses of a divisible covenant when the whole is part of a plan to obtain a monopoly, while the English courts have applied it to an employee's divisible covenant which is obviously oppressive and unreasonable."

The single purpose clearly discernible from the within antitrust complaint stated against the conspirators, Paramount, its agents, servants and employees, is the seizure of the film library and real property of Fleischer Studios,

Incorporated, by Paramount Pictures, Inc., the removal of Dave Fleischer and Max Fleischer from competition with Paramount, the withholding of the film library from release on television in competition with the motion picture product of Paramount and the ultimate outright sale of the Fleischer film library free of any obligations to the petitioner.

Judge Palmieri has held that the statute of limitations began to run on May 24, 1941, the date on which the said contract was exacted from the Fleischers by Paramount, and not in 1956 when the Fleischer product was sold for exhibition on television.

It has been held that in antitrust actions involving a continuous wrong from the effect of a series of acts designed to accomplish a common object and purpose that, the cause of action does not accrue, and applicable limitations do not begin to run until the common purpose and object of the conspiracy had been achieved. This rule is set forth in the opinion of Nevins, J., in the case of *Winkler Koch Engineering Co. v. Universal Products Co.* (1951), 100 F. Supp. 15, where in a case exactly applicable to the facts in this case he said in pertinent part:

> "The facts alleged in the complaint (which for *the purpose of this* separate trial are to be taken *as true) establish a single wrong and constitute a single cause of action.*
>
> "Where, as here, the suit is for the damages resulting from a single continuous wrong and from the *cumulative effect of a contemplated series of acts designed to accomplish a common purpose and object, the cause of action did not accrue, and applicable limitations did not begin to run until the common purpose and object of the conspiracy had been achieved.*

> "The multiple cause of action rule adopted and applied in certain antitrust cases which appears to require that applicable limitations begin to run from the time each overt act occurs or each item of injury is sustained is not applicable to the facts of the case at bar.
>
> • • • • • •
>
> "Considering also the single nature of plaintiff's cause of action, and giving effect to the federal rule of construction of statutes of limitations in cases involving fraud, plaintiff is not barred from recovery of damages against any defendant from any date."

(2) Circuit Judge Kaufman, erroneously states the Florida law on abatement of causes of action to be three years after the corporation was involuntarily dissolved by proclamation of the Governor of Florida in 1946, citing for his authority a 1961 statute, and a decision of a United States District Judge for the Southern District of New York (Weinfeld, J.), in *Walder v. Paramount Publix Corp.* in a case which involved a voluntary dissolution of a corporation.

Kaufman, C. J., said (265a-266a):

> "While plaintiff attempts to invoke his status as 'trustee in dissolution' or 'receiver' of the corporation, he is nonetheless barred. Under Florida law, corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved. *Fla. Stat. Ann. Sections*, 608.29, 608/30 (1961); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 917-19 (S.D.N.Y. 1955), and the present suit was filed more than eleven years after the demise of Fleischer Studios."

Mr. Justice Douglas in the case of *Bernhardt v. Polygraphic Company of America*, 350 U. S. 202 at page 205, said with respect to the erroneous application of New York law by the U. S. Court of Appeals, Second Circuit,

in a case which should have been decided under Vermont law:

> "As we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule."

In the instant case the Florida law is free from doubt or ambiguity. The shadow of doubt is cast, not by Florida Judges who have an enlightened view of the corporate law, but by New York Judges who have placed the Florida lawmakers and Judges in the role of confused thinkers in the field of corporate law on dissolution.

The three-year period after dissolution under Florida law during which a Florida corporation may transact business to wind up its affairs applies only to corporations voluntarily dissolved under Chapter 10096 of the Law of 1925 (Florida). It does not apply to a corporation involuntarily dissolved under the later enactment, Section 9 of Chapter 16880, Law of 1935 (Florida), which provided that the directors of a corporation involuntarily dissolved "shall be trustees for any property owned by such corporation and shall handle and dispose of the same for the benefit of the stockholders but that the corporations as such after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation." Dave Fleischer was properly appointed receiver of the Fleischer Studios, Incorporated, and the denial of his motion to have himself added as a party-plaintiff in such capacity was the denial of full faith and credit to the order of the Circuit Court of Florida which recognized the right of Dave Fleischer as "receiver" to administer the assets of the dissolved, Fleischer Studios, Incorporated.

In the case of *Gerstel v. William Curry's Sons Company, a Florida Corporation,* 25 So. 2d 560, the involuntary dissolution statute here in question, Chapter 16880, Laws of 1935, was passed upon by the Florida Supreme Court. The defendant corporation, Wm. Curry's Sons Company, was dissolved in 1936 under said law, for non-payment of its franchise taxes. Its officers formed a new corporation by the same name and assigned all of the assets of the former to the latter. The former had made a note of $6,000 in 1931, and when the successor was sued in 1941 on the said note, it successfully pleaded the three-year statute of limitations below as a defense to the action. In reversing the lower court, the highest court of Florida said:

> "* * * Under this state of facts the trial court held that the dissolution of the old corporation extinguished its debts, and that they did not survive the three-year provision of the statute for prosecuting claims against it, that Chapter 16880 did not violate the due process clause, the equal protection or the contract clause of the state and federal constitution, that the new corporation did not become responsible for the debts of the old corporation and was barred by the statute of limitations.
>
> *"We find ourselves unable to agree with the trial court's judgment. * * * The rule of the common law is obsolete and has long been superseded by statute in this state. Under the law of this state when a corporation is dissolved, its assets are first used to pay valid claims against it and if any remain, they are distributed among its shareholders.*
>
> *"We do not think that when a corporation is dissolved by the Governor as provided in Chapter 16880, Acts 1935 (Sections 610.16 to 610.18 Florida Statutes 1941), the three year prolongation period is available for the purpose of closing its business. The very terms of Section 9 of the Act support this view and the decisions of the New York Courts*

from which state it was derived support it. Seventy-three First Ave. Corp. v. Braunstein Bros., 168 Misc. 842, aff'd 170 Misc. 657. *Application of S. M. & J. Eisenstadt*, 256 App. Div. 488. Any other holding would be contrary to Section 33, Article 3 of the constitution providing that no statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage.

"It follows that the enactment of Chapter 16880, Acts 1935, did not shorten or otherwise affect the statute of limitations barring collection of the note.

"The Court below apparently took the position that since the old corporation was dissolved under Chapter 16880, Acts 1935, Section 9 of which provided that the corporation as such shall have no corporate rights or be authorized to transact any business as a corporation it was thenceforth dead and that its successor, the new corporation, could under no circumstances become responsible for its debts and obligations. If Chapter 16880 had been complied with this might have been true, but it imposed no penalty for failure of a dissolved corporation to comply with it."

Spector v. Hart, 139 So. 2d 923 (1962), and *McClung v. Hill*, 96 F. 2d 236 (1938), stands for the proposition that under Section 9 of Chapter 16880, Laws of 1935 (Florida), the involuntarily dissolved corporation is not "dead" but merely without power to carry on business in corporate name or form, which disability may be corrected by the payment of the arrears in franchise taxes tha have accrued during the three-year period of non-payment, prior to involuntary dissolution.

In the *Spector v. Hart* case, the Florida Court of Appeals, per Allen, J. held that Lester Hart, president of Lester Hart Galleries, Inc. (an involuntarily dissolved corporation), was not liable on a lease which he signed as president of the dissolved corporation during a period of

disability where Hart had procured the dissolved corporation to be reinstated by the payment of three years' taxes in arrears, while the action was pending against him. It was in this connection that Allen, J., cited *McClung v. Hill*, with approval and quoted from Hornstein on Corporations as follows:

> "Whether the penalty for franchise tax delinquency be suspension or forfeiture, its objective is simply to produce revenue to prevent use of corporate form without compensation to the State" (2 Hornstein, Corporation Law and Practice, Sec. 812 [1959] p. 354).

Even in the case of a corporation which is voluntarily dissolved the Supreme Court of Florida, in the case of *Neville v. Leamington Hotel Corporation* (47 So. 2d p. 81), has permitted the appointment of a receiver after the three-year period of limitations applicable to such voluntarily dissolved corporations where it cannot close its affairs in three years. The late Chief Judge Terrel, writing for the Florida Supreme Court said:

> "We are convinced that the reasonable interpretation of Section 612.47 F.S.A. is to continue the life of any dissolved corporation for three years in order that it may settle and close its business, convey its properties and distribute its assets. Any suit that may be necessary to do this may be brought after dissolution of the corporation. *If it is insolvent and cannot close its affairs as provided in this section, then a receiver may be appointed as provided in Section 612.50 F.S.A. Remedial statutes such as this should always be construed so as to afford relief rather than to deny it if parties move promptly and allege facts that state a cause of action.*" (Italics supplied.)

Certainly the *Neville* case, *supra*, destroys the argument that a receiver may not be appointed after the lapse of three years from the date of dissolution. 612.47 F.S.A.

(1951) is the identical statute (Section 48) which existed in Ch. 10096, Laws 1925, (see appendix B), which provided that "the powers of such trustees or receivers may be continued as long as the Circuit Court shall think it necessary for the purposes aforesaid." It is the identical section under which the petitioner was appointed receiver, by Circuit Judge Holt on December 5, 1957, pursuant to Chapter 608 F.S. 1957 (see appendix to main record, pp. 56-a to 59-a and appendix D to this petition).

The foregoing order of the Circuit Court of Dade County, Florida (Holt, C. J.), is presumptive evidence of its contents and is entitled to full faith and credit in this Court under the United States Constitution and cannot be attacked collaterally, under Article IV, Section 1 of the United States Constitution.

Cooper v. Newell, 173 U. S. 567;
Wisconsin v. Pelican Ins. Co., 127 U. S. 291;
Swift v. McPherson, 232 U. S. 51;
Hampton v. McConnell, 3 Wheat. 234;
Pennington v. Gibson, 16 How. 81;
Cheever v. Wilson, 9 Wall. 128;
Insurance Co. v. Harris, 97 U. S. 336;
Gibson v. Lyons, 115 U. S. 439;
U. S. v. Mason, 218 U. S. 115.

As was said in the *Walder* case, *supra*, by Weinfeld, J.:

> "The decisions of corporate dissolution are 'not procedural or controlled by the rules of court in which the litigation depends' rather are they matters which rest wholly with the state of incorporation and over which the Federal Government has no control."

The denial of his day in court to the petitioner by Circuit Judge Kaufman, at the U. S. Court of Appeals, Second Circuit, by U. S. District Judges Palmieri and Chief Judge Ryan and by Judge Harold Baer of the

Supreme Court, New York County, was therefore contrary to the Florida law, which is controlling.

(3) Since the three-year period of abatement invoked by the Circuit Court is not applicable, the only period of limitation applicable is the 20-year period of limitation contained in Section 95.11 of the Florida statutes, applicable to "actions other than those upon a contract, obligation, or liability founded upon an instrument of writing under seal." The within action was commenced in November, 1957. The statute would not be a bar until May 24, 1961, or 20 years after the date of the agreement dated May 24, 1941, which is Exhibit A supplied to the Court below and to this Court.

(4) The uniform federal four-year statute of limitations in antitrust actions was enacted in 1955 (69 Stat. 283, 15 U. S. C. Section 16[b]) but this did not become effective until January 7, 1956. Thus, the petitioner had until January 7, 1960, to commence his action under the antitrust statute and the action was timely commenced on November 14, 1957.

(5) The antitrust action was dismissed on the pleadings and not on the merits. The action of the U. S. Court of Appeals, Second Circuit, in dismissing the said cause of action based on the three-year Florida law of "abatement" and because the petitioner did not have an individual cause of action is clearly erroneous.

(e) A concise statement of the case in the accounting (first) cause of action containing the facts material to the consideration of the questions presented.

(A) Although Judge Palmieri dismissed the antitrust cause of action on July 27, 1959, on the grounds that the petitioner had no individual cause of action and that the corporate cause of action had abated, he held that the

fact that the cartoons in which petitioner had an interest were withheld from the television market from 1941 to 1956 "has no bearing in this complaint on any claim under the antitrust laws. It does not bear on plaintiff's rights, if any, growing out of the sale of the cartoons while they were in defendants' possession. These matters are cognizable under the first (accounting) cause of action" (68a).

Section I of Title 15, U. S. C., provides in pertinent part that:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states or with foreign nations, is declared to be illegal."

The crux of the first cause of action for an accounting lies in the treatment to be afforded to a contract which is clearly in violation of the antitrust laws but under which one of the contracting parties (Paramount) holds the property of its victim from the market, and subsequently sells the property at a huge profit to third parties. Are the distributees and purchasers of the victim's property immune from an accounting for the victim's property? It is in this context that the first cause of action is spelled out.

By the first cause of action the petitioner claimed that Paramount had obtained possession and control of the huge film library of Fleischer Studios, Inc. (New York and Florida), by means of practices and agreements which violated the antitrust laws and that they conspired with the defendant Max Fleischer on or about December 20, 1955, to destroy and eliminate the rights of the petitioner in 12 Popeye cartoons and a picture called The Raven for which they paid to said Max Fleischer the sum of $3,500 (24a).

It is further alleged that Paramount sold 119 Popeye cartoons to defendants A. A. P., Inc., and Associated Artists Productions Corporation for $1,500,000 and that said cartoons have been distributed by all of the remaining defendants on television without compensation to the petitioner or to Fleischer Studios, Incorporated, Florida.

Petitioner demanded the very accounting to which Judge Palmieri said he was entitled under the first cause of action. In addition to defendants Paramount, there were included as parties defendant in the first cause of action, A. A. P., Inc., and Associated Artists Productions, Inc., as distributors of the 119 Popeye cartoons, U. M. & M. TV Corp. as distributor of The Raven, W. P. I. X., Inc., as licensee of the Popeye cartoons, Dumont Broadcasting Corp. as licensee of The Raven, Flamingo Films, Inc., as licensee of Superman cartoons and King Features Syndicate, Inc., for having revived, sold and distributed the Popeye cartoons along with Paramount defendants without compensation to plaintiff.

All of the defendants (except defendant Max Fleischer) moved for summary judgment under Rule 56(b) F.R.C.P. in January and February, 1953, before Chief Judge Ryan "on the grounds that there is no issue as to any material fact, and that said defendants are entitled to a judgment as a matter of law" (81a, 85a, 87a, 89a, 91a). In support of the motion defendants attached the pleadings in two actions commenced by Dave Fleischer in the Supreme Court of the State of New York, County of New York (Exhibit B), being an action brought against N. T. A. Pictures, Inc., for a declaratory judgment with respect to the motion picture cartoon, Mr. Bug Goes to Town, which had been sold by Paramount Pictures Corporation to N. T. A. Pictures, Inc., and (Exhibit C) being an action brought individually by Dave Fleischer against W. P. I. X., Inc., for a violation of Sections 50 and 51 of the New

York Civil Rights Law, i. e., the invasion of the rights of privacy of Dave Fleischer. The latter statute is a penal statute.

In affirming the granting of summary judgment by Chief Judge Ryan predicated upon the appellees' plea of collateral estoppel, Circuit Judge Kaufman held that the rights and obligations of Paramount under the 1941 contract as well as Fleischer's inability to recover for injuries suffered by his corporation, were determined adversely to the plaintiff by the New York State Courts. The latter ruling was predicated upon the former holding of Judge Palmieri, so that what we have here is an estoppel by reason of the very decision from which an appeal could not have been pressed because the ruling of Judge Palmieri was interlocutory (see footnote 1, Opinion, Kaufman, C. J.).

In addition Circuit Judge Kaufman asserts that the issues were the same in the State Court actions as in the accounting action and have been fully litigated Petitioner has shown that in at least eight instances the issues were not the same and were not litigated. It is submitted that to deprive plaintiff of the right to trial on a showing that the matters in issue were specifically not tried by the State Court which are at issue in this accounting action is to deprive plaintiff of his property without due process of law.

(g) The basis for federal jurisdiction in the first instance of the accounting action was diversity of citizenship and a cause of action in part predicated upon the Copyright Laws of the United States (Title 17 U. S. Code and Title 28, Sections 1331, 1332, 1338 and 1400).

(b) A concise argument amplifying the reasons relied on for the allowance of the writ as to the accounting action.

1. The doctrine of collaterale stoppel cannot be invoked where the Judge in the first case had no legal authority to, or deliberately did not, pass upon issues and matters vital to a determination of and left open for decision in the first case remain undecided. The application of such doctrine in this case deprives the plaintiff of his property without due process of law.

In the case of *Ripley v. Storer*, 309 N. Y. 506, 518, cited by the Paramount-appellees, the New York Court of Appeals, per Van Voorhis, J., said:

> "The pleadings, decision and judgment in the EAGER trial were admitted in the record on this appeal. The testimony was offered in evidence but excluded and marked for identification. The established rule is that record evidence which is clearly identified may be considered on appeal under such circumstances. 'This has frequently been decided in respect to records of judgments, exemplification of bankrupt discharge, certificates of naturalization, etc. * * * Evidence of this character is received by the appellate court for the reason that being incontrovertible, it would be idle to send the case back for a new trial for the sole purpose of admitting it' (citing cases). We may therefore consider the evidence in the EAGER record, even though it was excluded, if it be material to the issue as it clearly is. In Black on Judgments the author states concerning *res judicata*, 'It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial' (citing *Carleton v. Lombard Auers*, 149 N. Y. 137)."

The motion for summary judgment was made by Paramount-appellees upon *Exhibit A*, a copy of the agreement of May 24, 1941; *Exhibit B*, the amended complaint and answer thereto in the action of Dave Fleischer against N.T.A. Pictures, Inc., *et al.*; *Exhibit C*, the amended complaint in the action of Dave Fleischer against W.P.I.X., Inc., and answer thereto; *Exhibit D*, the opinion of Justice Owen McGivern ordering a joint trial without consolidation of the above mentioned two actions; *Exhibit E*, fragmentary quotations from the agreement between Paramount-appellees and National Telefilm Associates, Inc. (N.T.A.), dated September 28, 1956, allegedly containing indemnification by Paramount to N.T.A., the defendants in the above first mentioned action; *Exhibit F*, infinitesimal fragments from a 1,000-page examination before trial of plaintiff.

The record of the trial of 593 pages and the thousands of exhibits presented before Judge Baer were not offered by the Paramount-appellees in support of their motion for summary judgment.

2. The record of the trial before Judge Baer shows that he excluded evidence of the status of the television industry in 1941 when the agreement of May 24, 1941, was executed to prove that it did not contemplate that the motion picture cartoons made by Fleischer Studios, Incorporated, and directed by Dave Fleischer would be projected for the sale of refrigerators, iceboxes and other products, since such use was unknown and not in existence at the time the contract of May 24, 1941, was executed (112a-113a).

Judge Baer ruled against the plaintiff David Fleischer when he offered to prove that Dave Fleischer and Max Fleischer participated in the very first television broadcast in the City of New York in 1930 and that the status of the motion picture and television industry in the year

1941 did not contemplate the use of motion picture cartoons for the sale of refrigerators, iceboxes and other products (112a-113a). Plaintiff offered to prove before Judge Baer that when you give a person the right to use your name or your picture in a motion picture, you give it with respect to the status of the industry at the time the contract was made and commercial advertising as it is known (Baer testimony, p. 537) at the time the contract is executed.

Judge Baer refused the offer of testimony saying:

> "*The Court* (Baer, J.): *It is not pertinent here. If you are telling me it is pertinent under the Civil Rights Law, I say you are wrong. If you are telling me it is pertinent on the N.T.A. case I don't see how it could possibly be pertinent* (s. m. p. 537, Baer minutes).
>
> "Mr. Garfield: *All I want to do is to prove the status of the industry.*
>
> "The Court (Baer, J.): *I will not let you prove the status of the industry*" (113a).

Since proof of the status of the television and motion picture industry was held to be irrelevant to the decision of the state court actions tried before Baer, J., it was not decided in those cases and was an open question before Chief Judge Ryan on the motion for summary judgment (see *Ettore v. Philco Television Broadcasting Co.*, 229 F. 2d 481 [3rd Cir. 1956], cert. den. 351 U. S. 926).

The use by all of the defendants in the first cause of action of the names of DAVE FLEISCHER and FLEISCHER STUDIOS, in the sale of products contrary to the manner envisaged by the parties to the contract of May 24, 1941, created a right of action not resolved in the trial before Judge Baer and fully open for determination before Chief Judge Ryan. The latter overruled the plea of the plaintiff to have a trial on the issue of status of the industry (see affidavit of Dave Fleischer, pp. 144a to

119a). This ruling of Ch. Judge Ryan is error. This matter is treated factually in the affidavit of Dave Fleischer in opposition to the motion for summary judgment at pages 111a to 119a and there is no denial or refutation by any person in opposition to said allegations. They are therefore deemed to be true for the purposes of the motion and every inference must be drawn in favor of the plaintiff (*United States v. Diebold*, 369 U. S. 654). In the *Diebold* case the Supreme Court of the United States said:

> *"In any event both findings represent a choice of inferences to be drawn from subsidiary facts contained in affidavits and depositions, submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this leads us to believe that inferences contrary to those drawn by the trial court might be permissible."*

Plaintiff's cause of action tried before Judge Baer against W.P.I.X., Inc., was "predicated upon a violation of the plaintiff's rights of privacy and the remedies afforded to him by Sections 50 and 51 of the Civil Rights Law of the State of New York of which provisions plaintiff request(ed) th(e) court to take judicial notice" (amended complaint, Dave Fleischer v. W.P.I.X., Inc., par. 2, Exhibit C).

A cause of action under Sections 50 and 51 of the New York Civil Rights Law is brought under a penal law which makes it a misdemeanor when "a person, firm or corporation uses for the purposes of trade, the name * * * of any living person without first having obtained the written consent of such person" (Sec. 51, Civil Rights Law).

The civil equitable action permitted for a violation of the penal provisions of Section 50 is covered by Section

51, Civil Rights Law. Such an action is cognizable for use of a person's name *"within this state (New York)"* and the person whose name has been used within the State of New York may *"maintain an equitable action in the supreme court of this state (New York)* against the person, firm or corporation so using his name, • • • to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use • • •."

The decision of Judge Baer (30 Misc. 2d 17) was limited to the effect of the use of the plaintiff's name in the State of New York and under the Civil Rights Law, Sections 50 and 51 above quoted from. The complaint of Fleischer v. W.P.I.X., Inc., was that its television station was operated within the City of New York (comp., 31, Exhibit C) and Judge Baer distinctly held that, within that complaint, proof of the status of the industry in 1941 was not pertinent to the issue. *But it is pertinent to the issue in this action.*

By contrast the complaint in the instant action which was dismissed by Chief Judge Ryan complains of the television broadcast authorized by defendants A.A.P., Inc., and Associated Artists Productions, Inc., over television stations WBZ (Boston), WBBN (Chicago), WBNS (Columbus), KBTV (Denver), WDSM (Duluth), KTLA (Los Angeles), WTVJ (Miami), KPNO (Phoenix), WCSH (Portland, Maine), WPRO (Providence), KCRA (Sacramento), KUTV (Salt Lake City), KSDV (San Diego), KRON (San Francisco), SSBT (South Bend), KREM (Spokane), KTVX (Tulsa), KFDX (Wichita) and other stations whose names are unknown to plaintiff (p. 28a). Thus, the action skips the boundaries of New York and goes into other jurisdictions not bound by the Civil Rights Law of New York and in consequence not bound by Judge Baer's decision.

Under the decision of *Ettore v. Philco Television Broadcasting Co., supra,* the violation of the plaintiff's rights in each of the above mentioned states gives rise to a cause of action determinable by the laws of that state and that state alone. But certainly the denial of a recovery under the penal statutes of the State of New York (Secs. 50 and 51, Civil Rights Law), particularly where the Trial Judge has ruled that the status of the industry was not pertinent to the trial of the action in New York, cannot prevent the recovery under such violations as are shown to exist in states other than New York.

Speaking of "the appropriation of the performance or production of a professional performer or entrepreneur," Judge Biggs, in *Ettore,* said in pertinent part (p. 487):

> "Where a professional performer is involved, there seems to be a recognition of a kind of property right in the performer to the product of his services. The theory may be summed up as follows: The performer as a means of livelihood contracts for his services with an entrepreneur. The finished product is, for example, a motion picture in which the performer's services are embodied. *If the motion picture is employed for some use other than that for which it was intended by the performer and the entrepreneur, the motion picture is employed in such a way as to deprive the performer of his right to compensation for the new use of the product.*" (Italics supplied.)

The question asked and answered in the negative in the *Ettore* case, page 488, was:

> *"Should a man be deemed to have granted a use, not in existence and not contemplated by either party, at the time the contract of sale was made?"*

In his affidavit in opposition to the motion for summary judgment Dave Fleischer said (111a-115a):

> "The status of the television industry in the year 1941 and particularly on May 24, 1941, did not per-

mit the use of motion pictures and motion picture cartoons for advertising of refrigerators, cereals, bicycles, bread, circuses, dairy products and other commercial products not connected with motion pictures; indeed this means and method of exploitation of motion pictures was unheard of until possibly a full dozen or more years later" (111a).

"In the action which was tried before Judge Baer in the New York Supreme Court I tried to prove the status of the industry in the year 1941 to be as I have above outlined, as not encompassing the use of motion pictures and motion picture cartoons for the sale of refrigerators, iceboxes and other commercial products and Judge Baer refused to permit the testimony saying that it was not relevant or pertinent under the Civil Rights Law nor was it pertinent in the action against National Telefilm Associates, Inc. It could not therefore possibly be an adjudication against me or Fleischer Studios, Incorporated, in this action against the defendants A.A.P., Inc., Associated Artists Productions, Inc., or W.P.I.X., Inc., which is predicated upon the commercial use of the said 119 Popeye cartoons which bear my name and the name of Fleischer Studios, Incorporated" (111a-112a).

"In the year 1941 the television industry as it existed in 1955 and 1956 was unknown and did not exist. There were some broadcasts but they were entirely experimental. The motion picture industry would not and did not permit the television broadcasting of motion pictures and motion picture cartoons as a matter of policy. It was generally felt that the success of the motion picture industry was threatened by the broadcasting of films, and the films were permitted to be lodged in vaults rather than to be used in what was considered a rival industry. It was not until after the end of World War II in the year 1945 that any motion pictures were used for any purpose on the television broadcasts" (114a-115a).

Judge Baer said with respect to the foregoing proffer of proof:

> "If I want to know that, I will read a book. You have made your offer and I told you I am not going to let you bring in any of that testimony. What the contract says I will take" (s. m. p. 563, Baer testimony, 113a).

But the contract of May 24, 1941, could not express and does not express the manner of exploitation of film cartoons for television purposes which were unknown to the industry at the time the contract was made.

The question which remained open before Chief Judge Ryan and which he refused to pass upon was this use in the exploitation of films by all of the defendants in a manner not contemplated by the parties to the Fleischer-Paramount contract because such use and exploitation was unknown to the parties. This was error.

3. The finding by Judge Baer that Paramount Pictures Corporation had the right to assign the contract of May 24, 1941, or sell the film cartoons to N.T.A. and P.R.M., Inc. (predecessor of Associated Artists Productions, Inc.), cannot be used as it was by Judge Ryan to eliminate the obligation of Paramount Pictures Corporation and the remaining defendants who have succeeded to and used the properties of Fleischer Studios for profit, to account for the moneys and properties so used and acquired.

(a) Paramount received $1,500,000 from the sale of the Popeye cartoons alone. It has not accounted for the sale of a single one of these cartoons. There were 12 included in the new cartoons covered by the agreement of May 24, 1933 (99a). Judge Ryan has ruled that it must not account for any part of this money and the U. S. Court of Appeals agreed with this ruling.

(b) Paramount received $500,000 from the package sale of six motion pictures including "Mr. Bug Goes To Town" from National Telefilm Associates, Inc., plus a percentage

of the income for which it has not accounted (39a). There was no allocation made by Paramount for the motion picture cartoon "Mr. Bug Goes To Town" out of this sum of $500,000. Is Paramount free to keep this money without accounting in this action because Judge Baer ruled that it had the right to sell the cartoons? Judge Ryan has held that it need never account for this money or any part of it and the U. S. Court of Appeals agreed with this ruling.

(c) Defendant Paramount Pictures Corporation turned over to National Telefilm Associates, Inc. (107a), positive prints of the film cartoon "Mr. Bug Goes To Town" which cost Fleischer Studios the sum of $82,555.96. No credit was given to the plaintiff nor to Fleischer Studios for these positive films which were received and used by National Telefilm Associates nor has Paramount ever accounted for the above item (107a). Judge Ryan has held that it need never do so and its obligations are at an end because of the trial before Baer, J. Although Judge Baer had no jurisdiction to compel an accounting by Paramount, Judge Ryan has held that Judge Baer's decision works a collateral estoppel and the U. S. Court of Appeals agreed with this ruling.

(d) By an assignment dated June 27, 1956, defendant King Features Syndicate, Inc., for the sum of $750,000 assigned to P.R.M., Inc. (predecessor of Associated Artists Productions, Inc.), "all television rights (as the art of process of television projection or exhibition is now or hereafter known) throughout the world, in and to all such motion picture cartoons (119 in number) based in whole or in part upon said comic strip entitled 'Thimble Theatre Starring Popeye'" (118a). In short King Features Syndicate gave an authorization to P.R.M., Inc., to use the 119 Popeye cartoons directed by Dave Fleischer and bearing his name as "director" in the manner now known to the industry for commercial exploitation, when in fact no such

method of exploitation was known to the industry in the years 1932 to 1942 when the said "Popeye" cartoons were produced by Fleischer Studios, Incorporated. Under the doctrine of the *Ettore* case, *supra*, both King Features Syndicate and Associated Artists Productions, Inc., are accountable to plaintiff, because no such issue was tried by Judge Baer. Judge Ryan has held that none of the defendants are accountable to plaintiff because of the doctrine of collateral estoppel. Judge Ryan has held:

> "The liability asserted against the defendants arose from an alleged breach of contract. It follows that a finding of no breach of contract by Paramount is a finding of no liability on the part of any of these defendants since the essential element of the case against them is a breach of contract" (160a).

(e) But this reasoning by Judge Ryan is erroneous. It is illogical. Paramount might not have breached its contract by assigning to P.R.M., Inc., nor to N.T.A. but it is nevertheless accountable for the moneys which it has received as the proceeds thereof. In the answer of N.T.A. it is alleged that "ownership of the cartoon (Mr. Bug Goes To Town) was transferred to Rainbow Productions, Inc. (predecessor of N.T.A.), and on September 28, 1956, all of the issued and outstanding capital stock of Rainbow Productions, Inc., was sold to N.T.A. under an agreement which preserved (Fleischer) Studios' rights under the agreement of May 24, 1941, to participate in proceeds derived from distribution of the cartoon after recoupment of Paramount advances" (104a).

(f) The advances of Paramount and the tortious failure of Paramount to plaintiff's damage to realize profits from the cartoons, while they were in the possession of defendants, and the sale of the cartoons to others are matters cognizable under the first cause of action (see opinion of

Palmieri, J., 63a). Judge Ryan has held otherwise and the U. S. Court of Appeals agreed.

(g) It is not denied that Dave Fleischer was the creator of the heavy known as "BLUTO," the villain in the Popeye series. The history of this creation is set forth at pages 119a to 123a of the appendix. For the purposes of this motion for summary judgment it must be taken as true that Dave Fleischer created the character "BLUTO" in his own image and was the inventor of said character.

It is provided in paragraph TWENTIETH of the May 24, 1941, agreement that:

> "Paramount shall have the sole complete, entire and exclusive right to use and exploit (and to cause to be used and exploited) any and all characters created for or used in any of the new cartoons, in any manner and form and by any means whatsoever now or hereafter known or devised, in the discretion of Paramount, including but not limited to commercial and publicity tieups, dolls, books, songs, records, designs for imprinting on fabrics and other materials, accessories of whatsoever nature, radio and television programs, and for use in, on or with commercial articles of whatsoever nature."

But this grant is subject to the payment of fifty per cent of the net amounts received of any and all income derived by Paramount from such use and exploitation (see Par. TWENTIETH, p. 45, agreement, May 24, 1941).

Therefore anyone succeeding to the rights of Paramount must pay to plaintiff, and to Fleischer Studios, 50 per cent of the amount received by them from such exploitation of the character invented by Dave Fleischer named "BLUTO."

The granting of summary judgment without a trial of the above issues deprives the plaintiff of his property without due process of law.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

KAUFMAN, *Circuit Judge:*

In a seemingly endless series of diffuse complaints, filed in both state and federal courts, plaintiff-appellant Dave Fleischer has alleged that Paramount Pictures Corporation and its co-defendants have deprived him of his proper share of the proceeds to various motion-picture cartoons. The present action, seeking an accounting, was originally filed in October of 1957; an amended complaint, adding a cause of action for alleged antitrust violations, was served the following month. In July of 1959, Judge Palmieri dismissed the antitrust claim, and refused to permit Fleischer to appear in the capacity of "receiver" of Fleischer Studios, Inc., a long defunct Florida corporation, 180 F. Supp. 717 (S. D. N. Y. 1959); plaintiff's second amended complaint, once again requesting an accounting, was finally dismissed on a motion for summary judgment by Chief Judge Ryan in September of 1963. 222 F. Supp. 40 (S. D. N. Y. 1963).

Apart from the merits of Fleischer's claims, several factors justify the dismissals below, which are hereby affirmed.[1] When the conclusory allegations of the complaints are pierced, be they characterized as "antitrust" or "accounting" claims, it becomes apparent that plaintiff is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. And since that agreement was not with Fleischer individually, but with Fleischer Studios, Inc., it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation. While plaintiff attempts to invoke his status as "trustee in dissolution" or "receiver" of the corporation, he is nonetheless barred

[1] Fleischer's appeal from Chief Judge Ryan's award of summary judgment also brings up for review Judge Palmieri's earlier order, previously nonappealable, and interlocutory

Under Florida law, corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved, *Fla. Stat. Ann.* §§608.29, 608.30 (1961); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 917-19 (S. D. N. Y. 1955), and the present suit was filed more than eleven years after the demise of Fleischer Studios.

Although it is not necessary to consider the point, most if not all of Fleischer's allegations are also foreclosed to him on grounds of collateral estoppel. The rights and obligations of Paramount under the 1941 contract, as well as Fleischer's inability to recover for injuries suffered by his corporation, issues central to the instant case, were determined adversely to the plaintiff by the New York State courts in *Fleischer v. W. P. I. X., Inc.*, 30 Misc. 2d 17, 213 N. Y. S. 2d, *appeals dismissed*, 14 A. D. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, 227 N. Y. S. 2d 913, *appeals dismissed*, 371 U. S. 16 (1962). Although Paramount was not a party to the New York litigation, both this court and the New York Court of Appeals permit a prior judgment to be invoked defensively as against the unsucessful party in the prior action, where the issues are the same and have been fully litigated. *Zdanok v. The Glidden Co.*, —— F. 2d —— (2nd Cir. 1964); *First Congregational Church v. Evangelical & Reformed Church*, 305 F. 2d 724 (2nd Cir. 1962), *Israel v. Wood Dolson Co.*, 1 N. Y. 2d 116, 151 N. Y. S. 2d 1 (1956).[2]

Although critical of Fleischer's attorney, Chief Judge Ryan denied Paramount's motion for an allowance of $15,000 counsel fees, and Paramount has filed a cross-appeal from his decision in this regard. While the con-

[2] The New York suits, although consolidated for trial, were brought separately against W. P. I. X., Inc., and N. T. A. Pictures, Inc. Since both W. P. I. X. and U. M. and M. TV Corp., N. T. A.'s wholly-owned subsidiary, are parties defendant to the present action, the case for invoking the earlier judgment is all the stronger.

duct of Fleischer's counsel was properly disapproved, we affirm Judge Ryan's refusal to tax Fleischer with Paramount's attorneys' fees. American courts have traditionally refused to include counsel fees in a losing party's bill of costs, except in the most extraordinary of instances, and have virtually never awarded such fees in an action at law. Every litigant, regardless of the seeming frivolity of his claims, is entitled to have them determined on their merits, and not to be "taxed out of court." When viewed in this light, the District Court's action was entirely proper.

APPENDIX B.

LAWS OF FLORIDA (1935)

CHAPTER 16880—(No. 109).

HOUSE BILL NO. 426

AN ACT Providing for the Clearing of Inactive, Dormant and Dead Corporations from the Corporation Files in the Office of the Secretary of State, and for the Dissolution or Cancelling Permits of those Inactive, Dormant and Delinquent Corporations Delinquent for a Period of Three Years Under Chapter 14677, Acts of 1931, Providing for How Notice Shall be Given and for a Proclamation Dissolving or Cancelling Permits of the Same.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That all corporations on file in the office of the Secretary of State, subject to pay a capital stock tax under Chapter 14677, Acts of 1931, Laws of Florida, which have failed for a period of three years to file reports and/or pay such capital stock tax, shall be classed as inactive and subject to be dissolved, or in the case of foreign corporations shall be subject to have their permits to do business in this State cancelled.

Section 2. It shall be the duty of the Secretary of State to make up a list of all such corporations subject to be dissolved or permits cancelled on the first day of January of each year and shall give notice by publication by publishing in a newspaper one time in the county in which the home office of the corporation is located in the case of domestic corporations, and in a paper published in Tallahassee, Florida, in the case of foreign corpora-

tions, giving notice that a Proclamation dissolving or cancelling the permits of such corporations will be issued three months after the date of publication. The expense of the above requirement to be paid from the Capital Stock Tax Expense Fund.

Section 3. Any such corporation which files reports and pays all back taxes due before the issuance of such Proclamation shall have all of its corporate rights restored and shall not be dissolved or its permit cancelled as provided in this Act.

Section 4. Three months after the date of publication of the notice above mentioned the Secretary of State shall prepare a list of the delinquent corporations contained in the published notices above mentioned and which have not, in the meantime, filed the reports and paid the tax due, and certify such list to the Governor who shall issue a Proclamation and cause the same to be attested by the Secretary of State under the Great Seal of the State dissolving or cancelling the permits of such delinquent corporations listed in the notices provided in Section 2 of this Act and which have not filed reports or paid taxes as provided in Section 3 of this Act, and the Secretary of State shall record the same in his office.

Section 5. The Secretary of State is hereby authorized to remove from his active files the names of all corporations dissolved or which have permits cancelled as above mentioned but shall keep them filed in a file labelled "Dissolved Corporations," and the names of such dissolved corporations and those having permits cancelled shall be available for use by any new corporations being formed or foreign corporations qualifying in this State.

Section 6. A list of all delinquent corporations dissolved or which have had permits cancelled under the

provisions of this Act shall be filed with the Clerk of the Circuit Court in each County in Florida; the Clerk of the Circuit Court is hereby required to file the same, without charge, but is not required to record it.

Section 7. Any judgment previously secured against any such corporation shall remain in full force and effect against any assets of the corporation and any suit in progress may be continued without being affected by the dissolution of the defendant corporation.

Section 8. If any Section, Clause, Sentence or other portion of this Act be declared invalid or unconstitutional, it shall in nowise affect or invalidate any of the remaining parts hereof.

Section 9. The directors of any corporation dissolved under the provisions of this Act shall be trustees for any property that may be owned by such corporation and shall handle and dispose of the same for the benefit of the stock-holders but the corporation as such, after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation.

Section 10. All laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Section 11. This Act shall take effect on June 30th, A. D. 1935.

Approved May 17, 1935.

Filed in Office Secretary of State May 18, 1935.

APPENDIX C.

LAWS OF FLORIDA CHAPTER 10096 (1925)

ARTICLE XIII

Dissolution.

Sec. 44. If it should be deemed desirable, in the judgment of the Board of Directors, and most for the benefit of any corporation organized under this Act, that it should be dissolved, the Board may adopt a resolution to that effect and call a meeting of the stockholders having voting power on a proposal to dissolve to take action upon the resolution so adopted. Such meeting of the stockholders shall be held upon notice given as provided in Section 24 of this Act and if at such meeting or any adjournment thereof the holders of record of stock entitled to exercise two thirds of all the voting power shall by resolution consent that the dissolution shall take place, a copy of such resolution together with a list of the names and residences of the directors and officers, certified by the President or a Vice-President and the Secretary or an Assistant Secretary and the Treasurer or an Assistant Treasurer, shall be filed in the office of the Secretary of State, who, upon being satisfied that the requirements aforesaid have been complied with, shall issue a certificate that such resolution has been filed and shall cause such certificate to be published in one issue of a newspaper published in the County where the principal office of the dissolved corporation was situated. The Secretary of State shall ascertain the charge for publishing the certificate of dissolution as aforesaid, and collect the amount from the corporation before the certificate of dissolution is issued; and upon the filing in the office of the Secretary of State of

an affidavit of the manager or publisher of the said newspaper that said certificate has been published once, in said newspaper, the corporation shall be dissolved. Whenever all the stockholders of record, having voting power on a proposal to dissolve shall consent in writing to a dissolution, no meeting of stockholders shall be necessary, but on filing such consent in the office of the Secretary of State, he shall, as above provided, issue a certificate of dissolution which shall be published as above provided.

Sec. 45. *Continuation of Corporation After Dissolution, for Purpose of Suit, Etc.—All corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their assets, but not for the purpose of continuing the business for which said corporation shall have been established.*

Sec. 46 *Trustees Under Dissolution.*—Upon the dissolution of any corporation under the provisions of Section 44 of this Act, or upon the expiration of the period of its corporate existence, limited by its certificate of incorporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell, and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations; or, after paying or adequately providing for the liabilities and obligations of the corporation, such trustees, with the written consent or vote of stockholders of record holding stock in the corporation entitling them to exercise at

least a majority of the voting power on a proposal to sell all the property and assets of the corporation may sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other State, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in proportion to their interest therein, but if any stockholder within thirty days after the mailing of notice to him of such sale, shall demand in writing that such corporation shall pay to him the fair cash value of his interest in the assets sold, such cash value shall be determined as provided in Section 38 of this Act, and shall be paid by said corporation within thirty days after such appraisal shall have been confirmed by the court.

Sec. 47. *Trustees Under Dissolution; Powers and Liabilities.*—The persons constituted trustees as aforesaid shall have authority to sue for and recover the aforesaid debts and property, by the name of the trustees of such corporation, describing it by its corporate name, and shall be suable by the same name for the debts owing by such corporation at the time of its dissolution, and shall be responsible fos such debts, to the amounts of the moneys and property of such corporation which shall come into their hands or possession.

Sec. 48. *Dissolved Corporations; Receivers for, How Appointed; Powers.—When any corporation organized under this Act shall be dissolved or cease to exist in any manner whatever, the Circuit Court sitting in Chancery on application of any creditor or stockholder of such corporation, at any time, may either continue such directors, trustees as aforesaid, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with*

power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such trustees or receivers may be continued as long as the Circuit Court shall think necessary for the purposes aforesaid.

Sec. 49. *Jurisdiction of Circuit Court.*—The Circuit Court sitting in Chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require.

Sec. 50. *Trustees or Receivers; Duties of.*—The said trustee or receivers after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of such debts and necessary expenses (or the making of adequate provisions therefor), they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives.

Sec. 51. *Dissolution; No Cause for Abatement of Actions; Suggestion on Records; Action; Continued Against Trustees or Receivers.—If any corporation organized under this Act becomes dissolved by the expiration of its charter or otherwise, before final judgment obtained in any action pending or commenced in any Court of Record of this State, against any such corporation, the said action shall not abate by reason thereof, but the dissolution of said corporation being suggested upon the record, and the names of the trustees or receivers of said corporation being entered upon the record, and notice thereof served upon said trustees or receivers, or if such service be impracticable upon the counsel of record in such case, the said action shall proceed to final judgment against the said trustees or receivers by the name of the corporation.*

APPENDIX D.

CHAPTER 608.29 LAWS OF FLORIDA (1957).

608.29 Dissolved corporations; receivers appointed by the court; powers.—

(1) When any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatever, the circuit court, sitting in chancery, on application of any creditor or stockholder of such corporation, at any time, may either continue such directors as trustees, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purpose aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of such trustees or receivers may be continued as long as the circuit court shall find necessary for the purposes aforesaid.

(2) The circuit court shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require.

(3) Such trustees or receivers, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the property and funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation if

the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in such manner as provided by order or decree of the court for that purpose. They shall, if there be any balance remaining after the payment of such debts and necessary expenses or the making of adequate provision therefor distribute and pay the same to and among those or their legal representatives who shall be justly entitled thereto, as having been stockholders of the corporation.

(4) Trustees or receivers, where appointed, shall make final distribution of assets within such time and in such manner as the court may determine in the order of appointment or in subsequent proceedings.